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**Datasheet for the decision
of 21 November 2024**

Case Number: T 0964/22 - 3.3.10

Application Number: 16739349.5

Publication Number: 3316854

IPC: A61K8/31, A61K8/36, A61K8/37,
A61Q13/00, A61K8/891, A61K8/92,
A61K8/11

Language of the proceedings: EN

Title of invention:
COMPOSITION COMPRISING MULTIPLE POPULATIONS OF MICROCAPSULES
COMPRISING PERFUME

Patent Proprietor:
The Procter & Gamble Company

Opponents:
Firmenich SA
Henkel AG & Co. KGaA

Headword:

Relevant legal provisions:
EPC Art. 123(2), 56
RPBA 2020 Art. 13(2), 12(4)

Keyword:

Main request - allowable

Decisions cited:

Catchword:



Beschwerdekammern
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Case Number: T 0964/22 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 21 November 2024

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 9 February 2022
revoking European patent No. 3316854 pursuant to
Article 101(3)(b) EPC.**

Composition of the Board:

Chair	P. Gryczka
Members:	R. Pérez Carlón
	L. Basterreix

Summary of Facts and Submissions

- I. The appellant (patent proprietor) appealed against the opposition division's decision revoking European patent No. 3 316 854.
- II. Two notices of opposition had been filed on the grounds of insufficient disclosure (Article 100(b) EPC) and lack of novelty and inventive step (Article 100(a) EPC).
- III. The following documents are relevant to the present decision:
- D4 US 2015/0132377 A1
D15 Experimental evidence filed with the statement of grounds of appeal
- IV. At the oral proceedings before the board, which took place on 21 November 2024, the appellant made the request filed as auxiliary request 6 on appeal its main request and withdrew all the higher-ranking requests previously pending.

Claim 1 of the main request reads as follows:

"A consumer product comprising a composition, the composition comprising:
an adjunct material;
a first population of microcapsules, the first population having a first median volume weighted particle size and comprising microcapsules comprising a partitioning modifier and a first perfume oil at a first weight ratio; and

a second population of microcapsules, the second population having a second median volume weighted particle size and comprising microcapsules comprising the partitioning modifier and a second perfume oil at a second weight ratio;

wherein (a) the first weight ratio and the second weight ratio are different and the partitioning modifier is selected from the group consisting of isopropyl myristate, and mono-, di-, and tri-esters of C₄-C₂₄ fatty acids, and/or (b) the first median volume weighted particle size and the second median volume weighted particle size are different and the partitioning modifier is isopropyl myristate;

wherein the composition is a fabric and home care composition."

- V. The opposition division concluded that this claim contained added subject-matter.

In the context of a narrower embodiment, the opposition division concluded that the claimed subject-matter was not inventive over the product in example 5 of D4.

- VI. The appellant's arguments were as follows.

Claim 1 had a basis in the combination of claims 1 and 9 as originally filed.

The arguments on inventive step starting from example 7 of D4, filed on appeal after the board's communication in preparation for oral proceedings, should not be admitted into the proceedings as no exceptional circumstances were apparent.

Example 5 of D4 had not been considered the closest prior art before the oral proceedings in opposition,

and experimental evidence D15 had been filed in reply at the earliest opportunity with the statement of grounds of appeal. Experimental evidence D15 should therefore be admitted into the proceedings.

Embodiments (a) and (b) in claim 1 differed from the consumer product in example 5 of D4 on account of the nature of the partitioning modifier. The problem underlying the claimed invention of providing a consumer product having an improved bloom of fragrance was credibly solved in view of the evidence in D15. The claimed solution, characterised by the nature of the partitioning modifier, would not have been obvious to a skilled person and was thus inventive.

VII. The respondents' arguments were as follows.

The embodiment in claim 1 of the main request which simultaneously required the differences defined in features (a) and (b) arose from a double selection of the partitioning modifiers defined in claim 9 as originally filed and thus contained added subject-matter.

Example 7 of D4 had been discussed in the context of the novelty of the claimed consumer product during the written procedure in opposition, with D4 being mentioned as the closest prior art. An inventive step objection based on this example should thus be admitted into the appeal proceedings.

D4 had been cited against the opposed patent in the context of both novelty and inventive step, so it was incumbent on the appellant to provide evidence of inventive step with respect to the whole content of D4. For this reason, D15 should have been filed earlier and

thus should not be admitted into the proceedings.

Considering example 5 of D4 as the closest prior art, the sole problem solved by the claimed consumer product was that of providing an alternative because D15, even if admitted into the proceedings, could not show an improvement by every embodiment of claim 1. As D4 disclosed isopropyl myristate as a suitable component of encapsulated fragrances, the claimed solution would have been obvious to a skilled person.

VIII. The parties' final requests were as follows.

The appellant's main request was that the decision under appeal be set aside and the patent maintained with the claims filed as auxiliary request 6 with the statement of grounds of appeal.

The respondents requested that the appeal be dismissed.

IX. At the end of the oral proceedings, the decision was announced.

Reasons for the Decision

1. The appeal is admissible.
2. Amendments
 - 2.1 Claim 1 of the main request relates to a consumer product comprising an adjunct material and two populations of microcapsules. Both populations contain the same partitioning modifier and a perfume oil. The populations differ on account of (a) the weight ratio between the partitioning modifier and perfume oil, (b) the median volume weighted particle size of said

populations, or both (a) and (b).

If the difference is as defined in option (a), the partitioning modifier is a mono-, di- and tri-ester of C₄-C₂₄ fatty acids; if the difference is that in option (b) or the combination of (a) and (b), the partitioning modifier is isopropyl myristate, which is a monoester of a C₁₄ fatty acid.

- 2.2 Claim 1 as originally filed and as granted relates to a microcapsule-containing consumer product having a partitioning modifier.

Claim 9 as originally filed and as granted refers back to any of its preceding claims and requires the partitioning modifier to be isopropyl myristate, a mono-, di- and tri-ester of C₄-C₂₄ fatty acids, castor oil, mineral oil, hexadecanoic acid, methyl ester isodecane, isoparaffin oil, polydimethylsiloxane, brominated vegetable oil and mixtures thereof.

- 2.3 The respondents argued that there was no pointer in the application as originally filed towards the combination of features in claim 1. Isopropyl myristate had been singled out in embodiment (b) of claim 1, and this was technical information not originally disclosed. The embodiment in claim 1 requiring different partitioner modifiers for the combination of options (a) and (b) had no basis in the application as originally filed either.

However, claim 9 as originally filed provides a basis for the claimed subject-matter. The board is unable to see what technical information that was not originally disclosed could be provided by claim 1.

2.4 The opposition division considered that the embodiment "and" in claim 1 defined added subject-matter as the different partitioning modifier of options (a) and (b) in claim 1 arose from a double selection.

However, there is only one possible partitioning modifier for the combination of options (a) and (b), namely isopropyl myristate.

Claim 1 defines a first population of microcapsules having a partitioning modifier, and a second population comprising "the" partitioning modifier, i.e. the partitioning modifier is the same in both populations. The embodiment simultaneously requiring differences (a) and (b) can only fulfil that condition if the partitioning modifier is isopropyl myristate. The basis for that embodiment can be found in claim 9 as originally filed.

2.5 The board thus concludes that the features of claim 1 of the main request have the required basis (Article 123(2) EPC).

No objections have been raised against the dependent claims, nor are any apparent.

2.6 By defining the nature of the partitioning modifier, the scope of protection is limited with respect to that conferred by the patent as granted. No objections based on Article 123(3) EPC were raised by the respondents, nor are any apparent.

3. Clarity

Respondent 2 argued that claim 1 of the main request was not clear as it was not apparent how the

partitioning modifier needed to be selected for the embodiments simultaneously fulfilling differences (a) and (b) in claim 1.

However, the requirement in claim 1 that the second population of microcapsules contained "the" partitioning modifier of the first population inevitably implies that it can only be isopropyl myristate. This argument is thus not convincing.

4. Sufficiency of disclosure

On appeal, respondent 1 merely referred to its arguments during the opposition proceedings with respect to the issue of sufficiency of disclosure, without addressing the reasoning in the decision under appeal.

The board informed the parties in its communication in preparation for oral proceedings that, under these circumstances, the opposition division's conclusion in this respect was not to be revised.

At the oral proceedings before the board, respondent 1 merely relied on its written submissions. The board thus sees no reason to depart from its preliminary view.

5. Novelty

None of the objections raised on appeal against broader versions of the claimed subject-matter was maintained with respect to the consumer product of claim 1 of the main request. The board does not have any objections of its own. The claimed subject-matter is novel.

6. Inventive step

6.1 Claim 1 relates to a consumer product having two populations of microcapsules, which differ on account of (a) the weight ratio between the partitioning modifier and perfume oil, (b) the median volume weighted particle size of said populations, or both (a) and (b).

Option (a) requires the partitioning modifier to be a mono-, di- and tri-ester of C₄-C₂₄ fatty acids, including isopropyl myristate, which is a C₁₄ fatty acid ester.

Option (b) and the combination of options (a) and (b) require the partitioning modifier to be isopropyl myristate.

6.2 Example 7 of D4 as the closest prior art -
admissibility of this line of argument

6.2.1 In its letter in reply to the board's communication, respondent 1 relied on example 7 of D4 as the closest prior art. This embodiment had not been cited as the closest prior art earlier on appeal.

Respondent 1 argued that this line of argument was nevertheless to be examined on appeal. Example 7 of D4 had been considered the closest prior art in the opposition division's annex to the summons to oral proceedings and cited against the novelty of a number of the appellant's requests on appeal. It was thus to be expected that it was relevant for the inventiveness of the claimed subject-matter. Respondent 1 argued in point 3.4 of its reply to the grounds of appeal that if the subject-matter of the main request then pending

were deemed novel, it would not be inventive over D4.

6.2.2 The board is not convinced.

In the reply to the grounds of appeal, respondent 1 does not refer to example 7 of D4 in the context of inventive step, despite arguing that this example was novelty-destroying for embodiment (a) of claim 1.

The main request on appeal was auxiliary request 6 before the opposition division, which was filed again with the statement of grounds of appeal. With respect to that subject-matter, respondent 1's reply to the grounds of appeal refers to examples 4 and 5 of D4 (see point 9.2) but not example 7.

Example 7 of D4 was thus identified as the closest prior art on appeal for the first time in a letter subsequent to the board's communication in preparation for oral proceedings. The admission of this line of argument is thus subject to Article 13(2) RPBA and requires exceptional circumstances.

Since the claimed subject-matter has been on file from the start of the appeal proceedings and was arguably novel over example 7 of D4, any objection in this respect could and should have been filed earlier. This line of argument is thus not admitted into the proceedings.

6.3 Example 5 of D4 as the closest prior art

The opposition division concluded that example 5 of D4 was the closest prior art, and all the parties regarded this embodiment as a suitable starting point.

In the written procedure, example 4 of D4 was mentioned in addition to example 5. It was, however, not disputed that both examples were equivalent for the purpose of examining the claimed invention. The board will refer only to example 5 in the following.

Example 5 of D4 discloses fabric conditioner samples comprising capsules 4 and 6 of example 1 (see Tables 2 and 10). It was undisputed that the capsules in example 5 differed from all the embodiments in claim 1 at least in that they contained mineral oil as the partitioning modifier.

6.4 Problem underlying the claimed invention

The appellant defined the problem underlying the claimed invention as providing a consumer product having an improved bloom of fragrance.

6.5 Solution

The claimed solution is the consumer product containing two populations of microcapsules with a perfume oil and a partitioning modifier in claim 1, characterised by the nature of the partitioning modifier.

6.6 Experimental report D15: admissibility into the proceedings

6.6.1 The appellant relied on the experimental evidence filed as D15 on appeal to show that the problem as defined above had been solved by the consumer product of claim 1.

The respondents argued that D15 should have been filed earlier and requested that it not be admitted into the

appeal proceedings. The relevance of D4 had been clear from the start of the opposition proceedings, and it was incumbent on the appellant to show that an effect was achieved with respect to every embodiment of D4.

- 6.6.2 D15 was filed with the statement of grounds of appeal with the aim of showing the effect of isopropyl myristate vs mineral oil, which is the partitioning modifier in example 5 of D4.

Example 5 of D4 was identified as the closest prior art for the first time at the oral proceedings in opposition. The opposition division's annex to the summons to oral proceedings relied on other embodiments of D4 as the closest prior art. This is undisputed.

- 6.6.3 Respondent 1 argued that D4 had been filed with the notice of opposition and example 5 discussed in the context of novelty. At the time the opposition division issued the summons, auxiliary request 16, which was the request examined for inventive step in the decision under appeal, had not yet been filed. It was thus not surprising that the opposition division chose a different passage of D4 as the closest embodiment for that subject-matter.

Claim 1 of auxiliary request 6 before the opposition division, which is claim 1 of the main request on appeal, had already been an independent claim in previously pending auxiliary request 1. However, example 5 of D4 had not been identified as the closest prior art against that subject-matter.

As a consequence, the appellant had no objective reason to provide experimental evidence addressing this embodiment of D4 prior to the oral proceedings before

the opposition division. The appellant thus filed D15 at the earliest opportunity, namely with the statement of grounds of appeal.

- 6.6.4 The respondents also argued that example 5 of D4 had been cited against the novelty of the claimed subject-matter. The appellant thus should have expected that inventive step objections would arise from this subject-matter too.

However, not every novelty objection inevitably leads to an inventive step issue. In the case in hand, the appellant had never been confronted with an inventive step objection based on example 5, despite the fact that some of its requests were novel over it.

- 6.6.5 The respondents further argued that the appellant should have requested a postponement of the oral proceedings if it considered that experimental evidence was required.

This was indeed a possibility. However, the mere existence of a different mode of action does not render D15 inadmissible.

In view of the events at the oral proceedings before the opposition division, the board decides to admit D15 into the proceedings as it addresses a point which had not been raised before and was filed subsequently at the earliest opportunity.

- 6.7 Success of the claimed solution

- 6.7.1 The appellant relied on the evidence filed as D15 to show that the problem of providing a consumer product having an improved bloom of fragrance had been credibly

solved by the consumer product in claim 1.

Test 1 of D15 compares compositions comprising two populations of microcapsules having mineral oil as the partitioning modifier (as in example 5 of D4), with compositions comprising isopropyl myristate as in claim 1. The mixture, diluted in water, was applied to terry towels in a washing machine during the last rinse cycle. The results were evaluated by external panellists and expert perfumers. The aroma provided by the microcapsules containing isopropyl myristate was stronger.

The respondents questioned whether D15 could show the alleged effect, but the board did not find the respondents' various reasons convincing.

- 6.7.2 The respondents argued that the provided data lacked any measurement error and the number of experiments was small. There were thus doubts whether any of the values in D15 could be significant.

The improvement in aroma with respect to dry fabric and rubbed fabric ranges from 2 to 6 on a scale of 0 to 100. The difference is arguably small, but the board fails to see why it should be disregarded, in particular absent any evidence which could prove the opposite.

- 6.7.3 The respondents argued that the data only related to isopropyl myristate but not to mono-, di- and tri-esters of C₄-C₂₄ fatty acids.

However, isopropyl myristate is an ester of a C₁₄ fatty acid, and option (a) of claim 1 defines only one type - not two types - of partitioning modifier, namely mono-,

di- and tri-esters of C₄-C₂₄ fatty acids, which includes isopropyl myristate.

- 6.7.4 The respondents also argued that any result shown for isopropyl myristate would not inevitably be achieved by every mono-, di- and tri-ester of C₄-C₂₄ fatty acids.

However, the respondents did not provide any evidence in this respect or any reasons why this was the case in view of the chemical or physical properties of fatty acid esters. This argument is thus not convincing.

- 6.7.5 Respondent 2 argued that the composition used in test 1 of D15 was not a consumer product as it merely consisted of microcapsules in water.

However, there is no apparent reason why the results would have been different if the microcapsules had been formulated differently.

- 6.7.6 Lastly, respondent 2 argued in writing that the capsules in D15 were "cymel-based" instead of having the components in D4. The argument was not further pursued at the oral proceedings.

The appellant argued that Alcapsol 200, which was used in D4, was no longer available for purchase and it had been necessary to use only similar components. For want of any evidence to the contrary, the appellant's argument is successful.

- 6.7.7 The board thus concludes that, in view of D15, the problem of providing a consumer product with an enhanced bloom of fragrance is credibly solved by the consumer product of claim 1, characterised by the

nature of the partitioning modifier.

6.8 It remains to be examined whether the claimed solution would have been obvious to a skilled person in view of the prior art.

6.8.1 The available prior art does not link the partitioning modifiers in claim 1 with the effect sought. D4 discloses isopropyl myristate and capric/caprylic triglycerides in paragraph [0067] as suitable solvent materials but fails to link any of them with an enhanced bloom of fragrance. The claimed solution is thus inventive (Article 56 EPC).

7. The board thus concludes that the appellant's main request is allowable.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the opposition division with the order to maintain the patent with the claims of the main request, filed as auxiliary request 6 with the statement of the grounds of appeal, and a description to be adapted if necessary.

The Registrar:

The Chair:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated